

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
CENTRAL DIVISION

**FILED**  
**NOV 15 2000**  
*[Signature]*  
CLERK

SOUTH DAKOTA FARM BUREAU, INC., )  
SOUTH DAKOTA SHEEP GROWERS )  
ASSOCIATION, INC.; HAVERHALS )  
FEEDLOT, INC.; SJOVALL )  
FEEDYARD, INC.; FRANK D. )  
BROST; DONALD TESCH; WILLIAM )  
A. AESCHLIMANN; SPEAR H. )  
RANCH, INC.; MARSTON HOLBEN, )  
MONTANA-DAKOTA UTILITIES CO.; )  
NORTHWESTERN PUBLIC SERVICE; )  
AND OTTER TAIL POWER COMPANY, )

PLAINTIFFS, )

-vs- )

MARK W. BARNETT, IN HIS )  
OFFICIAL CAPACITY AS ATTORNEY )  
GENERAL OF SOUTH DAKOTA, AND )  
JOYCE HAZELTINE, IN HER )  
OFFICIAL CAPACITY AS SECRETARY )  
OF STATE OF SOUTH DAKOTA, )

DEFENDANTS, )

and )

DAKOTA RURAL ACTION; AND )  
SOUTH DAKOTA RESOURCES )  
COALITION, )

Intervenors/Defendants. )

CIV. 99-3018-CBK

**BIG STONE PARTNERS' REPLY  
BRIEF OPPOSING STATE  
DEFENDANTS' MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

Montana-Dakota Utilities Company ("MDU"), Northwestern Public Service ("NWPS") and Otter Tail Power Company ("Otter Tail") (or collectively, "Big Stone Partners") provide this brief to the Court opposing that portion of defendants Hazeltime and Barnett's motion for partial summary judgment addressing the ripeness issue as to the factual basis for that portion of the Big Stone Partners' claims that Amendment E violates the United States Constitution.

### **SUMMARY OF ARGUMENT**

The Big Stone Partners rely upon four factual scenarios to demonstrate the unconstitutional impact of Amendment E upon certain aspects of their business. Hazeltine and Barnett contend that one of these scenarios lacks factual ripeness, presumably meaning that those facts may not be considered in determining the constitutional impact of Amendment E upon the Big Stone Partners. Hazeltine and Barnett improperly focus on the factual ripeness of one aspect of the ultimate issue, rather than focusing upon the fundamental question of Amendment E's unconstitutional impact upon the Big Stone Partners' business under all the applicable facts. Stated another way, ripeness analysis deals with the question of whether a controversy is ripe for adjudication, not whether some of the facts relevant to the controversy are "ripe." In any event, that factual scenario dealing with deregulation of the utility industry is neither hypothetical nor speculative and carries with it sufficient operational inevitability to warrant consideration.

### **FACTS**

It may well be that the impact of Amendment E upon the utility industry was a consequence not intended by the drafters and proponents of the enactment. (Brief Exhibit A, ¶14). Nonetheless, the broad reach of Amendment E clearly impacts the utility industry. Section 21 is broadly stated and prohibits corporations not otherwise exempted under Section 22 from engaging in farming or

owning any interest in real estate used for farming. None of the exemptions in Section 22 apply to the Big Stone Partners, except Subsection (10) which exempts agricultural land purchased for a prospective nonfarming use, provided that the nonfarm use must be developed within five years, and during the five-year period any of that land not being put to a nonfarm use may only be used for farming by leasing the property to a qualified entity. Section 24 requires divestiture after five years.

At least four factual situations exist under which Amendment E impacts the Big Stone Partners, either as owners of the Big Stone Plant or as utilities.

#### **1. Impaired Value of the Big Stone Plant**

The Big Stone Plant is comprised of approximately 2,100 acres, of which approximately 705 acres are directly dedicated to operation of the power plant. While the current structure of the plant is grandfathered (Amendment E, Section 22(4)), any change in the ownership regime will terminate grandfathering and subject the plant to the provisions of Amendment E. (Ralph Brown depo, p. 9) The plant is more valuable to the present owners in their current ownership regime, than to a purchaser of one or more ownership interests. (Rodney Leyendecker depo, p. 50). Even the Big Stone Partners themselves could not restructure proportional ownership among themselves, as they once did in 1986 (Mark Rolfes depo, pp. 36 and 37). The value of the Big Stone Plant to the partners

is impaired because the value of the plant to a purchaser is less than the value of the plant to the existing partners in their existing proportions. (Ralph Brown depo, p. 16; Ralph Brown expert report, Brief Exhibit B).

According to Rodney Leyendecker of NWPS, the value of the land at the Big Stone Plant to NWPS is impaired by 20 to 50 percent. (Rodney Leyendecker depo, pp. 50, 51).

## **2. Future Generating Facilities Impaired.**

The construction of future generating plants in the state of South Dakota is severely restricted by Amendment E. The restriction deals with the increased cost of developing new generating facilities, when Amendment E restricts ownership (as well as options) to five years when the development of a plant in today's environment is a 10 to 12 year process. (Bob Krava depo, pp. 37, 38; Ralph Brown Expert Report, p. 4, Brief Exhibit B).

## **3. Future Transmission Line Construction Is Impaired.**

Current practice in the construction and maintenance of electrical transmission lines is for the utility to acquire an easement of 150 to 300 feet in width which permits the utility access to the line and control over the easement for safety purposes, but leaves maintenance of the land in the right-of-way easement to the farmer who maintains the land and keeps it free of weeds through his or her farming practices. (Bob Krava depo, pp.

16-23). Presently, it is customary in the industry to obtain an easement for about the price of the acquisition of fee title to the land involved. (Bob Krava depo, pp. 32-36). Otter Tail's Land Management Director estimates that the cost for acquisition and maintenance of rights-of-way under Amendment E will require the company to purchase fee title and will increase the cost to the company of 200 to 300 percent to obtain easements. (Bob Krava depo, p. 34). To this will be added the cost of maintenance of the property to control weeds and underbrush.

#### **4. Amendment E Will Exacerbate Deregulation.**

As of June, 2000, the District of Columbia and 24 states have adopted some form of restructuring. (Response<sup>1</sup> ¶1 and Exhibit C) Montana is one of these states, a state in which MDU does business. (Response ¶1). Two components of restructuring are relevant to consideration of Hazeltine and Barnett's motion. First, each utility business must have the flexibility to respond to the requirements of restructuring in a manner which best suits that individual company's business objectives. This may or may not include a sale or spinoff of transmission assets, but this represents one consideration. The second consideration comes into play when the restructuring order requires action on the part of utilities, such as divestiture of generation assets (the Big Stone Plant) or transmission assets. A sale or spinoff of the Big Stone

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<sup>1</sup>Big Stone Partners' Response to Defendants' Statement of Material Facts in Support of Defendants' Motion for Partial Summary Judgment.

Plant by one or more of the Big Stone Partners will adversely affect them because of the value which can be obtained for the ownership interest in the plant. (See discussion, *supra*, p. 3).

A sale or spinoff of transmission assets will be devastating in terms of costs for all utilities in this state, including the Big Stone Partners. Amendment E would apply to all existing transmission assets which are either sold or spun off. This would require the acquisition of fee title for easement properties at an increased cost of 200 to 300 percent of what otherwise would be the acquisition cost. The companies would be required to purchase fee title to the land and exclude farming of the land after five years. (Bob Krava depo, pp. 33-35, Brief Exhibit A, ¶17, 19, 21 and 23).

#### ARGUMENT AND AUTHORITIES

The State takes the unusual position that a particular set of facts (deregulation) should be segregated from all the other facts showing the adverse effect of Amendment E upon the Big Stone Partners. The State asks the Court through summary judgment to declare deregulation irrelevant to consideration of the issue. This "factual ripeness" argument finds no basis in any of the cases cited by the state. Each case examines all the facts relevant to the ultimate issue of ripeness of the controversy in determining whether the controversy is mature for resolution. Interestingly, the Court in Meadows of West Memphis vs. City of West Memphis, 800 F2d 212 (8<sup>th</sup> Cir. 1986) specifically noted that the possible

occurrence of other, future injuries, did not make the action unripe. *Id.* at 215. In fact, the case bears a strong resemblance to the situation of the Big Stone Partners in this case. It involved a suit against West Memphis for blocking the issuance of development bonds for at least a year with the developer losing potential profits during that period. Here, the Big Stone Partners have already seen the value of their generating plant diminished, had a restriction on future land purchases imposed upon them and seen their ability to construct new transmission facilities impaired. Deregulation is immediately on the horizon.

*Bob's Home Service, Inc. vs. Warren County*, 755 F2d 625 (8<sup>th</sup> Cir. 1985) involved an action for losses due to business restrictions arising from a county master plan. The Appellate Court reversed the District Court on the issue of ripeness and found that there was an immediate injury that was redressable by the relief requested. The court further specifically held that additional factual development would not assist in resolving the case.

While the State properly uses *Pacific Gas & Electric vs. Energy Resources Commission*, 461 US 190 (1983) to state the ripeness test accurately, that is, whether a hardship to the parties exists if the matter is not adjudicated now and whether the matter is appropriately resolved now (*Id.* at 201), the discussion on page 201 of the decision recognizes the need for advance planning, precisely the Big Stone Partners' situation. After

noting that the utilities would suffer substantial hardship from a postponement of the decision, and after quoting from the Rail Reorganization Act Cases that "one does not have to await the consummation of threatened injury to obtain preventative relief . . .," the court concluded

To require the industry to proceed without knowing whether the moratorium is valid would impose a palpable and considerable hardship on the utilities, and may ultimately work harm on the citizens of California. *Id.* at 201, 202.

Restructuring of the utility industry is a valid concern of the Big Stone Partners, as well as other South Dakota utilities, and they should be entitled to know whether their analysis of the impact of Amendment E is correct.

As noted above, it is unnecessary to wait for the inevitable infliction of an injury to establish standing. Regional Rail Reorganization Act Cases, 419 U.S. 102, 143 (1974). Injury is inevitable in this case because the Big Stone Partners will buy or sell property, whether because of deregulation or business requirements and, because the Attorney General "shall" enforce Amendment E (Section 24) they will be forced to divest. The Eighth Circuit has previously recognized this principle in the context of a preenforcement challenge to a mandatory excess premium disbursement program in Minnesota. In Re: Worker's Compensation Refund, 46 F3d 813, 821-22 (8<sup>th</sup> Cir. 1995). In response to the State's assertion that Section 10, the statute's cost shifting



provision, was not ripe because it had not been enforced, the Court stated:

Section 10's payment provisions are mandatory, and no reason exists to believe that it will not be enforced. A small time delay before enforcement does not keep this controversy from being ripe. (Citation to the Regional Rail Reorganization Act Cases omitted). *Id.* at 821, 822.

This is but the other side of the coin of the State's "factual ripeness" argument. It is the sum total of the facts which indicate whether the claim is mature. It is not an isolated, partial set of facts which is either ripe or not ripe, but the entire set of facts dealing with the claimed constitutional damage.

Finally, the courts draw a distinction among the cases as to whether an issue is primarily legal, or factually intensive. If it is factually intensive, ripeness is more difficult to demonstrate than where a facial challenge is made. *See, Hodel vs. Virginia Surface Mining and Reclamation Association*, 452 US 264, 283, 293-94 and *Pacific Gas & Electric*, *supra*, at 201-02. Clearly, this case involves a facial challenge. The broad factual scenario logically and easily contrasts the provisions of Amendment E.

Setting aside the "factual ripeness" issue for a moment, even under the State's view of the case, the issue of Amendment E's impact upon the utilities in a deregulated environment is ripe for decision. The District of Columbia and 24 states have implemented deregulation. At least 12 of those states have required, outright or structurally, some form of divestiture comparable to the issues raised by the Big Stone Partners. (Response ¶1). These are not


theoretical requirements. Additionally, two bills were pending in Congress as of June 9, 2000. (Response ¶1). As stated in the Regional Rail Reorganization Act Cases, *supra*, it is unnecessary to wait for the inevitable infliction of an injury to establish standing. Deregulation is an issue which, in fairness, the Court must consider.

#### CONCLUSION

The State has sought to fractionalize ripeness analysis for the utilities. This approach is not supported by the relevant cases on the subject. In any event, the issue of restructuring is pervasive and legitimately part of the planning process of the utilities. The State's motion for summary judgment, seeking to segregate facts related to deregulation, should be denied.

Dated this 8<sup>th</sup> day of November, 2000.

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#### CERTIFICATE OF SERVICE

David A. Gerdes, of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 8<sup>th</sup> day of November, 2000, he mailed by United States mail, first class postage thereon prepaid, a true and

correct copy of the foregoing in the above-captioned action to the following at their last known addresses, to-wit:

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UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
CENTRAL DIVISION

SOUTH DAKOTA FARM BUREAU, INC.,	)	CIV. 99-3018-CBK
SOUTH DAKOTA SHEEP GROWERS	)	
ASSOCIATION, INC.; HAVERHALS	)	
FEEDLOT, INC.; SJOVALL	)	
FEEDYARD, INC.; FRANK D.	)	
BROST; DONALD TESCH; WILLIAM	)	
A. AESCHLIMANN; SPEAR H.	)	
RANCH, INC.; MARSTON HOLBEN,	)	
MONTANA-DAKOTA UTILITIES CO.;	)	
NORTHWESTERN PUBLIC SERVICE;	)	PLAINTIFF BIG STONE PARTNERS'
AND OTTER TAIL POWER COMPANY,	)	RESPONSE TO DEFENDANTS'
	)	FIRST INTERROGATORIES,
PLAINTIFFS,	)	REQUESTS FOR ADMISSION,
	)	AND REQUESTS FOR PRODUCTION
-vs-	)	
	)	
MARK W. BARNETT, IN HIS	)	
OFFICIAL CAPACITY AS ATTORNEY	)	
GENERAL OF SOUTH DAKOTA, AND	)	
JOYCE HAZELTINE, IN HER	)	
OFFICIAL CAPACITY AS SECRETARY	)	
OF STATE OF SOUTH DAKOTA,	)	
	)	
DEFENDANTS,	)	
	)	
and	)	
	)	
DAKOTA RURAL ACTION; AND	)	
SOUTH DAKOTA RESOURCES	)	
COALITION,	)	
	)	
Intervenors/Defendants.	)	

Answering Defendants' First Interrogatories, Requests for Admission and Requests for Production, dated May 23, 2000, the Big Stone Partners state as follows:

**INTERROGATORIES AND REQUESTS FOR ADMISSION**

1. Identify the person or persons answering these interrogatories and requests for admissions, and all persons assisting in their preparation, including:

- a. Every person consulted in order to secure the requested information;
- b. Every person who furnished the information upon which the responses are based;

- c. Every person who secured the information upon which the responses are based;
- d. Every person who prepared and participated in the preparation of the responses; and
- e. Every person involved in furnishing any subsequent modifications to any responses to any of these interrogatories or requests for admissions.

ANSWER. Todd Guerrero, Esquire, Office of General Counsel, Otter Tail Power Company, 215 South Cascade Street, P.O. Box 496, Fergus Falls, Minnesota, 56538-0496; Susan Anderson Bachman, Attorney, NorthWestern Public Service, 125 South Dakota Avenue, Sioux Falls, South Dakota, 57104; and Douglas W. Shulz, Senior Attorney, Montana-Dakota Utilities Co., 400 North Fourth Street, Bismarck, North Dakota, 58501.

Those consulted, furnishing information and securing information were: Mark Rolfes, Bernadeen Brutlag, Donald R. Ball, Rodney Leyendecker and Bob Krava, all of whom have been deposed by defendants.

2. Identify all potential witnesses you expect may be called at trial who have not yet been disclosed in the Utilities FRCP 26 disclosures.

ANSWER. Presently, the witnesses proposed to be called by the utility plaintiffs are those disclosed in the Big Stone Partners initial disclosures, and those disclosed in the Big Stone Partners expert disclosures.

3. Identify all witnesses you expect to call at trial regarding regulation, deregulation, restructuring, "unbundling," or divestiture of the electric or natural gas industries and the substance of the facts and/or opinions to which the witness is expected to testify, and the grounds for any opinions.

ANSWER. See answer to interrogatory number 2. You have deposed Mark Rolfes, Bernadeen Brutlag, Donald R. Ball, Rodney Leyendecker and Bob Krava. If you wish to depose other disclosed witnesses, they will be made available. Dr. Brown's expert report

copy of a letter written by counsel for the SDEUC to Daniel J. Todd, President of the Municipal Attorneys Association. This letter was written at the direction of the Board of Directors of the SDEUC. Attached as Exhibit E are SDEUC minutes of December 11, 1997, and June 23, 1998, showing attention to the issue by the Board.

12. Admit that the Attorney General's official explanation and description of Amendment E which was provided to the South Dakota voters was accurate and true.

RESPONSE. That which is stated is accurate.

13. If your response to paragraph 12 is anything other than an unqualified admission, state all facts upon which you rely for your response, identify all persons having knowledge of those facts, and identify all documents referring or relating in any way to those facts.

ANSWER. While the ballot explanation is accurate as far as it goes, it casts the impact of Amendment E in terms of "ownership of land." In fact, if the plain language of Amendment E is recognized, it affects any ". . . interest, whether legal, beneficial or otherwise, in real estate used for farming. . ." It is the unstated impact of Amendment E which damages the Big Stone Partners.

14. Admit that Amendment E was not intended to apply to any land for which any utility currently holds easements or to any future purchase of easements for transmission lines, towers, or ingress and egress for utility maintenance.

RESPONSE. Witnesses supporting Amendment E have so testified.

15. If your response to paragraph 14 is anything other than an unqualified admission, state all facts [upon] which you rely for your response, identify all persons having knowledge of those facts, and identify all documents referring or relating in any way to those facts.

ANSWER. From the standpoint of the Big Stone Partners, this case is about unintended consequences. Whether the proponents of

Amendment E intended to affect utility easements is irrelevant to the subject matter of the action.

16. Admit that the purpose of Amendment E is unrelated to existing easements or the future purchase of easements for transmission lines, towers, or ingress and egress for utility maintenance.

RESPONSE. Denied

17. If your response to paragraph 16 is anything other than an unqualified admission, state all facts upon which you rely for your response, identify all persons having knowledge of those facts, and identify all documents referring or relating in any way to those facts.

ANSWER. Amendment E relates to existing easements should restructuring in the electric industry require a spinoff of transmission assets, either from a regulatory standpoint or from a business standpoint. It affects the future purchase of easements, as testified to by those utility witnesses that have been deposed, in driving up the price of the acquisition of utility easements.

18. Admit that the utilities have not performed any calculations (other than those disclosed in Dr. Brown's expert report) which would show the extent of damages claimed in Paragraph 5 of the First Amended Complaint for Declaratory and Injunctive Relief, which alleges that "Amendment E . . . will greatly increase the cost of developing transmission facilities."

RESPONSE. Denied

19. If your response to paragraph 18 is anything other than an unqualified admission, state all facts upon which you rely for your response, identify all persons having knowledge of those facts, and identify all documents referring or relating in any way to those facts.

ANSWER. The Big Stone Partners see no necessity to perform a comprehensive study of the financial detriment which will flow to utilities if Amendment E applies to transmission facilities. The damage is manifest, as testified to by witnesses Brutlag, Ball, Leyendecker and Krava.



20. Admit that the utilities have not calculated the number of easements or total acreage of transmission line easements that it claims are affected by Amendment E.

RESPONSE. Denied.

21. If your response to paragraph 20 is anything other than an unqualified admission, state all facts upon which you rely for your response, identify all persons having knowledge of those facts, and identify all documents referring or relating in any way to those facts.

ANSWER. MDU has determined that it has 1,317 electric transmission easements in South Dakota.

Otter Tail has determined that it has a total of 2,880 easements in South Dakota, consisting of 613.68 miles of transmission easement and 204.32 miles of distribution easement. Otter Tail estimates that the transmission easements comprise 5,953 acres and the distribution easements comprise 247 acres.

22. Admit that there are currently no regulatory or legal restrictions prohibiting the current title holder (Otter Tail Power Company or the Utilities) from selling agricultural land adjacent to the Big Stone facility to another power company for power production, to a commercial business, to a qualified family farm (as defined in Amendment E), or to an enterprise that is exempt from Amendment E (as defined in Amendment E).

RESPONSE. Denied.

23. If your response to paragraph 20 (sic) is anything other than an unqualified admission, state all facts upon which you rely for your response, identify all persons having knowledge of those facts, and identify all documents referring or relating in any way to those facts.

ANSWER. It is sheer sophistry to suggest that simply because no regulatory body or statute prohibits the sale of agricultural land, the Big Stone Partners or any of them are free to do so. As stated in the complaint, and as stated by numerous witnesses, the practical effect of Amendment E lessens the value of each company's interest in the Big Stone Plant because a sale of any interest will

modify the existing estates in land owned by the partners, thus destroying the grandfather in Amendment E. This will have an adverse effect upon any purchaser.

24. Admit that none of the Utilities are currently planning electric or natural gas transmission or electric generation projects to be located in South Dakota and that no applications are pending to any regulatory body for siting approval for any such projects.

RESPONSE. Admitted, provided that planning is ongoing and projects can be developed at any time.

25. If your response to paragraph 24 is anything other than an unqualified admission, state all facts upon which you rely for your response, identify all persons having knowledge of those facts, and identify all documents referring or relating in any way to those facts.

ANSWER. See answer to 24.

26. For each utility, explain whether it has been in violation of SDCL Ch. 47-9A and explain the circumstances of such violation.

ANSWER. If Chapter 47-9A applies to utility easements, it raises a question of compliance with that chapter. However, the Big Stone Partners believe their leasing of the land held for future expansion at the Big Stone Plant would comply with Chapter 47-9A, because of SDCL § 47-9A-12.

27. For each utility, explain whether it relied on any exemptions from SDCL Ch. 47-9A before November 1998, identifying each exemption claimed.

ANSWER. No exemptions were relied upon. No enforcement was ever pursued against the Big Stone Partners. Had it occurred, the law could have easily been amended, because it was the belief of the utilities that Chapter 47-9A was not intended to affect the operation of utilities.



**DAMAGES TO BIG STONE PARTNERS  
AS RESULT OF THE PASSAGE OF AMENDMENT E**

The Big Stone Power Plant, located in Grant County, South Dakota, is owned as tenants in common by MDU, NWPS, and Otter Tail. The plant employs 76 workers with an annual payroll (including benefits) of \$5 million, and annual property tax payment of \$1.9 million. The Big Stone Power Plant owns approximately 2,100 acres, of which approximately 1,350 acres are used by the present power plant operation. Currently, 552.8 acres, reserved for potential future development, are cash rented as farmland. The 1999 cash rent was \$15,840.

Loss of Farm Rental Income

If the legal ownership of the Big Stone Plant were to change, the successor owner or owners of the facility would be subject to the provisions of Amendment E. According to the provisions of Amendment E, the successor owners would be required to convert the farmland to non-farm use or divest themselves of the farmland within five years. The economic losses suffered if the land has to be converted to nonfarm use (and left idle) would be the present value of the lost farm rents. That is, after the five year time period (deadline), the loss would be the present value of lost farm rents from that date forward. That is:

$$\text{PV of LOSS (farm rental)} = \sum_{T=6}^n \text{Rent}_T / (1 + D)^T$$

Where:

\$52.8

Rent<sub>t</sub> = rent received from ~~1,350~~ acres of farmland,  
 D = discount rate for converting future rents to present value,  
 T = 6, ... , n years.

Using the \$15,840 annual cash rent, an 8 percent interest rate, and an assumed inflation rate of 3 percent, the present value of the loss farm rental income over a 25 year, 50 year, and 100 year time horizon is: \$155,000, \$221,000, and \$246,000, respectively.

Legal ambiguities for successor owners in the interpretation of Amendment E about whether the land could stand idle while awaiting development without divestment could also impair the market value of the whole plant. Typically, a new generating facility requires a planning, permitting, and construction time period of 10 or more years. Impairment of the value of land could occur if the land reserved for future development must be divested within the five-year deadline, which would preclude future expansion. While this uncertainty in the interpretation of Amendment E is not easily quantifiable it does not preclude this as a potential source of damage. Clearly, it adversely affects the market value of the plant in the hands of the present owners.

#### Transmission Lines

In the construction and operation of transmission facilities, electric utility companies take transmission easements, which includes the land between poles or towers. Transmission line easements are typically 100-foot wide strips traversing the property. To minimize the cost of these easements to the utility (and ultimately the customer), farmers

are allowed to farm the land between the poles and towers as they normally would. Amendment E does not allow this for newly-constructed transmission lines because the ownership of the land between poles or towers constitutes a beneficial interest in land which cannot be retained for longer than five years. Therefore, the utility companies will have to convert this land to solely nonfarm uses. Since this would preclude the farmer from using this land for farming, it would sacrifice the earning potential of that farmland completely.

Currently, the cost of acquiring a transmission line easement is a payment equal to 100 percent of fee title, with the farmer able to farm between towers. Under Amendment E utilities will likely have to acquire fee title for new transmission corridors. If the farmer could not farm the easement strip it would be very disruptive to the farming operation, would raise the cost of land acquisition and would increase the need for condemnation (thus adding more expense to the process). One company estimates this will add up to 200% to the current cost of right of way acquisition. In some cases, fences or barriers might have to be installed to separate farm and non-farm land. This would add additional costs of acquiring transmission line easements.

#### Deregulation and Restructuring

The forces of deregulation and restructuring occurring throughout the country will ultimately have an impact in South Dakota. One likely result of restructuring would be the separation of the generation, transmission, and distribution parts of the business. The sale

or spin-off of the Big Stone Plant in any restructuring plan would greatly raise the cost due to the Amendment E requirement of selling or holding idle the land set aside for future development. Likewise, as shown above, the high cost of acquiring transmission line easements would raise the cost of transmission facilities. That is, the creation of a new transmission corporation would make all grandfathered transmission easements subject to the terms of amendment E, and all easements would need to be reacquired.

#### Lost Economic Development Potential for South Dakota

All states operate in a competitive environment for new and expanding businesses. Amendment E could damage South Dakota's competitiveness in the siting of new and expanding electrical generation facilities. The siting of a generation facility in a state brings great economic development opportunities to a state. Increased property and sales tax base, expanded employment opportunities, increased sales and income for local businesses are all benefits of economic development. The increased costs of idle land, uncertainty of Amendment E, and increased transmission line costs<sup>2</sup> all reduce South Dakota's potential for economic development in the siting of future generation facilities. Furthermore, not only are new plants less likely to choose South Dakota as a site but also the expansion of existing generation facilities is impaired by the various provisions of Amendment E.





UNITED STATES DISTRICT COURT DISTRICT OF SOUTH DAKOTA CENTRAL DIVISION		STIPULATION	
1	South Dakota Farm Bureau, Inc.;	1	It is hereby stipulated and agreed, by and between
2	South Dakota Sheep Growers	2	the above-named parties through their attorneys of
3	Association, Inc.; Haverhals	3	record, whose appearances have been hereinabove noted,
4	Feedlot, Inc.; Sjovald Feedyard,	4	that the deposition of Ralph Brown may be taken at this
5	Inc.; Frank D. Brost; Donald	5	time and place, that is, at the law offices of Woods,
6	Tesch; William A. Aeschlimann;	6	Fuller, Shultz & Smith, Sioux Falls, South Dakota, on
7	Spear H. Ranch, Inc.; Marston	7	the 24th day of July, 2000, commencing at the hour of
8	Holben; Marson and Marian	8	11:00 a.m.; said deposition taken before Carol Johnson,
9	Holben Family Trust;	9	RMR, a Notary Public within and for the State of South
10	Montana-Dakota Utilities Co.;	10	Dakota; said deposition taken for the purpose of
11	Northwestern Public Service;	11	discovery or for use at trial or for each of said
12	and Otter Tail Power Company,	12	purposes, and said deposition is taken in accordance
13	Plaintiffs,	13	with the applicable Rules of Civil Procedure as if take
14	-vs-	14	pursuant to written notice. Insofar as counsel are
15	Joyce Hazeltine, in her official	15	concerned, the reading and the signing of the transcrip
16	capacity as Secretary of State of	16	by the witness are waived.
17	South Dakota, and Mark W. Barnett,	17	
18	in his official capacity as	18	
19	Attorney General of South Dakota,	19	
20	Defendants.	20	
21	-and-	21	
22	Dakota Rural Action and South	22	
23	Dakota Resources Coalition,	23	
24	Defendant-Intervenor.	24	
25		25	
*****		*****	
DEPOSITION OF		RALPH BROWN,	
Ralph Brown		called as a witness, having been first duly sworn,	
*****		testified as follows:	
*****		*****	
APPEARANCES:		EXAMINATION BY MS. GIEDD:	
Mr. David A. Gerdes		Q Dr. Brown, you've been deposed before, haven't you?	
May, Adam, Gerdes & Thompson		A I have, yes.	
Pierre, South Dakota		Q And so you are familiar with some of the important things	
Attorney for Montana-Dakota Utilities		like we can't talk at the same time?	
Co., Northwestern Public Service,		A I am.	
Otter Tail Power Company.		Q Right. You're an expert in economics?	
Ms. Roxanne Giedd		A Yes.	
Ms. Diane Best		Q Are you an expert in sociology?	
Assistant Attorneys General		A No.	
Pierre, South Dakota		Q What about socioeconomic?	
Attorneys for Joyce Hazeltine and Mark		A Well, depends on how that is defined, but obviously over my	
W. Barnett.		years as an economist I've done a variety of economic	
Ms. Virginia Brannon		studies, which some of those would be socioeconomic as well	
Earthlaw		as economic.	
University of Denver		MR. GERDES: Excuse me, counsel, why don't we have a	
Denver, Colorado		stipulation on the record for this deposition. I don't	
Attorney for Dakota Rural Action and		think this was noticed, was it?	
South Dakota Resources Coalition.		MS. GIEDD: No, it was not. That's fine.	
ALSO PRESENT:		MR. GERDES: May it be stipulated that the deposition of	
Mr. John Bixler		Ralph Brown may be taken at this time and place, without	
*****		prior notice, and for all purposes authorized by the	
INDEX OF EXAMINATIONS		Federal Rules of Civil Procedure, and that insofar as	
By Ms. Giedd:		counsel are concerned, reading and signing of the	
Page 4		deposition by the deponent may be waived.	
By Ms. Brannon:			
Page 21			
INDEX OF EXHIBITS			
NUMBER	DESCRIPTION	REFERENCED	
41	Brown Report on Damages to Big Stone	6, 9	
	Partners as Result of the Passage of		
	Amendment E		

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1 A That's my understanding.  
 2 Q Do you know what -- are they using the land for grazing or  
 3 for hay, or do you know?  
 4 A I think in one of the agreements I saw the word "corn," so  
 5 I suspect they're -- well, I don't know exactly how they're  
 6 using the land in terms of cropping and pasture or  
 7 whatever, but they're using it for agriculture uses, that's  
 8 -- that's obvious.  
 9 Q Okay. You make a statement in Exhibit 41, this is right  
 10 under -- on Page 1, there's a section entitled "Loss of  
 11 Farm Rental Income," and the first sentence under that  
 12 says: "If the legal ownership of the Big Stone Plant were  
 13 to change. . . ."  
 14 Now, is this entire section of your expert report based  
 15 upon that premise?  
 16 A My understanding is that Chapter 22, Subchapter 4 is a form  
 17 of a grandfather clause. So if -- if the ownership stays  
 18 as it is, it's not subject to provisions of Amendment E.  
 19 If that were to change in some manner, ownership  
 20 proportions or whatever, then my understanding is that it  
 21 would then invoke Subchapter, I think 10, which gives a  
 22 five-year period of time which it could be farmed, and then  
 23 after that it would have to -- it would be disposed of or  
 24 -- or they could no longer farm it, lease it or whatever as  
 25 agriculture land.

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1 Q Dr. Brown, all I'm -- just to make sure I understand, the  
 2 loss calculation you do in this section of your report is  
 3 based on the idea that this would occur if the legal  
 4 ownership of the Big Stone property changes, is that right?  
 5 A That's right.  
 6 Q Okay. Now, are you aware of any plans the Big Stone  
 7 Partners have to sell the facility at this time?  
 8 A No.  
 9 Q If there were any sale, certainly all the partners would  
 10 have to agree, isn't that right?  
 11 A Yes.  
 12 MR. GERDES: That's objected to as calling for a legal  
 13 conclusion, without proper foundation. Answer if you can.  
 14 A I think so.  
 15 Q Did Mr. Krava indicate to you that there was a sale that  
 16 was a possibility at the current time?  
 17 A Well, anything is possible, but he didn't indicate that  
 18 there was any current pending sale.  
 19 Q Now, the next sentence of that section under "Loss of Farm  
 20 Rental Income" says, quote: "According to the provisions  
 21 of Amendment E, the successor owners would be required to  
 22 convert the farmland to non-farm use or divest themselves  
 23 of the farmland within five years."  
 24 Do you see that sentence?  
 25 A I do.

Page

1 Q I think that you said that the provision of Amendment E  
 2 that that's referring to would be Subsection 22-10?  
 3 A Yes.  
 4 Q In this section of the report you do a calculation of a  
 5 loss over three different time horizons, correct?  
 6 A That's correct.  
 7 Q Now, am I correct that the loss you're calculating there is  
 8 dependent upon the sale of the Big Stone property?  
 9 A Yes.  
 10 Q And would you agree with me that if there is a sale, these  
 11 calculations are presuming that the new owners would not  
 12 immediately develop that land?  
 13 A Yes.  
 14 Q Does this land that's being held for future development  
 15 have some intrinsic value over -- because it's being held  
 16 for development that's over and above the value of the  
 17 property for farming? Do you understand that question?  
 18 A I think what you're asking is -- is the potential value of  
 19 that land greater than farmland value? Is that the  
 20 question you're asking?  
 21 Q Well, basically is it worth more to whoever owns the Big  
 22 Stone property than it would be just when -- as farmland?  
 23 A I would think so.  
 24 Q And do you think that the -- that intrinsic value is  
 25 probably more significant than the value of the land that

Page

1 could be -- the value of the land for a cash rental to  
 2 farmers?  
 3 A I think that's the same question.  
 4 Q So your answer would be you think so?  
 5 A Well, I think -- you asked me if the value of the land,  
 6 intrinsic value of the land, was greater than its cash  
 7 value of the rent, which obviously determines the value of  
 8 the land as farmland. And so what you're asking is the  
 9 value of the land intrinsically more than its farmland  
 10 value, and the answer is yes.  
 11 Q Now, does Section 22-10 in your understanding require th  
 12 the land be divested within five years?  
 13 A Well, I'm no legal expert, and I don't see the word  
 14 "divest" in Subsection 10. So I don't know.  
 15 Q I think that your report refers to either selling the land  
 16 within five years or keeping it idle. Are those the two  
 17 alternatives that -- to your understanding?  
 18 MR. GERDES: Or converting to non-farm use is what it  
 19 says.  
 20 Q So it's three things: You can either sell it, convert it  
 21 to non-farm use, or hold it idle?  
 22 A Well, let's read it. It says: "The economic losses  
 23 suffered if the land has to be converted to non-farm use  
 24 (and left idle). . . ." You know, I'm reading --  
 25 ". . . convert the farmland to non-farm use or divest

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Page

1 themselves of the farmland within five years." So --

2 Q Go --

3 A Go ahead.

4 Q Is that two things, non-farm use, you have -- and left

5 idle, or are there three things, non-farm use, left idle,

6 or sale?

7 A Well, you could have non-farm use that isn't idle. So that

8 would be one use. You could have non-farm use that's idle.

9 That would be a third -- or second, and then you would have

10 divesting, but that would be a third.

11 Q On Page 2 you indicate that a new generating facility

12 requires a planning, permitting, and construction type

13 period of 10 or more years?

14 Yes.

15 Q Do you see that section?

16 A I see that.

17 Q Is that what information you received from Mr. Krava?

18 A Yes.

19 Q Do you know how long it takes to construct a new generation

20 facility?

21 A No.

22 Q If this future land is developed at some point, do you know

23 whether some of the facilities at the present plant would

24 be able to be utilized?

25 A Okay. Future land, you mean --

Page 14

Page

1 Q The 552.8?

2 A You asked me if the future land. I think you mean if the

3 land would be developed in the future -- would you restate

4 that again.

5 Q Sorry. Okay.

6 A That caught me right away, and then I forgot everything

7 else from that point.

8 Q If the 552.8 acres --

9 A Thank you.

10 Q -- are used to build an expansion or a new generation

11 facility on that, do you know whether some of the

12 facilities at the current Big Stone Plant could be utilized

13 as part of the new generation facility?

14 A I don't know that.

15 MR. GERDES: Off the record.

16 (Off the record discussion.)

17 Q On Page 2 you state, quote: Impairment of the value of

18 land could occur if the land reserved for future

19 development must be divested within the five-year

20 deadline. . . ."

21 And just to make sure -- do you see that sentence,

22 Doctor?

23 A Give me some direction there. Which paragraph is it in?

24 Q The first full paragraph, five lines down.

25 A Okay. "Impairment of the value of the land could occur if

1 land reserved for future development must be divested

2 within the five-year deadline. . . ." Yeah. If we follow

3 the premise that the value of land had intrinsic value

4 greater than farmland and we had to divest it within five

5 years so we couldn't use it for that purpose, it would be

6 an impairment of its value.

7 Q And where is this requirement that it be divested within

8 five years?

9 A As indicated, it doesn't say that in Subsection 10. I

10 think the legal interpretation is yet to be made by the

11 courts, and there are some who are concerned, particularly

12 utilities, that it might be interpreted as if the

13 development doesn't take place within five years, one

14 possibility could be that it would require the land be

15 divested after that. They would have to divest themselves

16 of the land. That's one possibility. As we indicated,

17 otherwise it could be idle, or it could be put into other

18 non-farm uses. So -- that's my answer.

19 Q So you're not suggesting that they have to divest it. It

20 still goes back to the three possibilities we discussed

21 earlier?

22 A That's correct.

23 Q The last sentence of that paragraph states, quote:

24 Clearly, it adversely affects the market value of the plant

25 in the hands of the present owners, end quote. Do you see

1 that line?

2 A Yes.

3 Q Do you know what the market value of the plant is right

4 now?

5 A No. No, I don't.

6 Q Now, are you suggesting that the market value of the plant

7 is adversely affected by the inability to rent 552.8 acres

8 for farming?

9 A Yes.

10 Q And how -- I mean, in terms of a percentage of the value of

11 the whole plant, what are we talking about?

12 A I haven't done any quantification of that. I don't know

13 what the current value of the plant is, so I couldn't

14 answer that question.

15 Q Now, your next section of your report entitled

16 "Transmission Lines," as I understand it, assumes that

17 Amendment E would not allow farming to occur between

18 poles and the towers, is that correct?

19 A That's the interpretation that I've used in my report here,

20 yes.

21 Q Do you know what provision of Amendment E that's based on?

22 A Well --

23 MR. GERDES: First of all, I'll just object that it

24 calls for a legal conclusion. Go ahead and answer it if

25 you can.

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<p>1 APPEARANCES:</p> <p>2 Woods, Fuller, Shultz &amp; Smith</p> <p>3 Attorneys at Law</p> <p>4 300 South Phillips Avenue</p> <p>5 Sioux Falls, South Dakota 57104</p> <p>6 By Mr. John Simko</p> <p>7</p> <p>8 for South Dakota Farm Bureau, Inc., South Dakota</p> <p>9 Sheep Growers Association, Haverhals Feedlot, Inc.</p> <p>10 Sjovall Feedyard, Inc., Frank D. Brost, Donald</p> <p>11 Tesch, William A. Aeschlimann;</p> <p>12</p> <p>13 Tonner, Tobin &amp; King</p> <p>14 Attorneys at Law</p> <p>15 P. O. Box 1456</p> <p>16 Aberdeen, South Dakota 57402</p> <p>17 By Mr. Thomas Tobin</p> <p>18</p> <p>19 for Spear H. Ranch, Inc.; Marston Holben; Marston</p> <p>20 and Marian Holben Family Trust;</p> <p>21</p> <p>22 May, Adam, Gerdes &amp; Thompson</p> <p>23 Attorneys at Law</p> <p>24 P. O. Box 160</p> <p>25 Pierre, South Dakota 57501</p> <p>By Mr. David A. Gerdes</p> <p>for Montana-Dakota Utilities Co., Northwestern</p> <p>Public Service, Otter Tail Power Company;</p> <p>South Dakota Attorney General</p> <p>Attorneys at Law</p> <p>500 East Capitol</p> <p>Pierre, South Dakota 57501</p> <p>By Ms. Diane Best &amp; Ms. Roxanne Giedd</p> <p>for Joyce Hazeltine &amp; Mark W. Barnett;</p> <p>Earthlaw</p> <p>Attorneys at Law</p> <p>University of Denver - Forbes House</p> <p>1714 Poplar Street</p> <p>Denver, Colorado 80220</p> <p>By Ms. Virginia Brannon</p> <p>for Dakota Rural Action and South Dakota</p> <p>Resources Coalition.</p>	<p>1 STIPULATION</p> <p>2 It is stipulated and agreed by and</p> <p>3 between the above-named parties, through their attorn</p> <p>4 of record, whose appearances have been hereinabove</p> <p>5 noted, that the deposition of Rodney Leyendecker, may be</p> <p>6 taken at this time and place, that is, at the offices of</p> <p>7 May, Adam, Gerdes &amp; Thompson, Pierre, South Dakota, o</p> <p>8 the 16th day of May, 2000, commencing at the hour</p> <p>9 4:00 p.m.; said deposition taken before JERRY MAY, :</p> <p>10 Registered Professional Reporter and Notary Public</p> <p>11 within and for the State of South Dakota; said</p> <p>12 deposition taken for the purpose of discovery or for</p> <p>13 at trial or for each of said purposes, and said</p> <p>14 deposition is taken in accordance with the applicable</p> <p>15 Rules of Civil Procedure as if taken pursuant to writ</p> <p>16 notice.</p> <p>17</p> <p>18 RODNEY LEYENDECKER,</p> <p>19 called as a witness, being first duly sworn, deposed a</p> <p>20 said as follows:</p> <p>21</p> <p>22 EXAMINATION BY MS. BEST:</p> <p>23 Q. We are taking the deposition of Rodney</p> <p>24 Leyendecker for the purpose of hearing testimony</p>

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Rodney Leyendecker  
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1 A. That's correct.  
 2 Q. Did you have any dealings with Northwestern  
 3 Public Service Company when you were president and CEO  
 4 of Northwestern Energy Corporation?  
 5 A. Provided regulatory consultation, rate  
 6 making, economic analysis.  
 7 Q. So then the person who really would be the  
 8 key person to talk to about easements would be somebody  
 9 on the operating side of Northwestern Public Service  
 10 Company, is that correct?  
 11 A. And specifically the right-of-way guy, the  
 12 guy that secures the rights-of-way.  
 13 Q. And his name eludes you at the moment?  
 14 A. At the moment it does. Age, I think.  
 15 Q. Starts with an H?  
 16 A. No, I said it is age I think.  
 17 Q. Mr. Leyendecker, I would like to direct your  
 18 attention to Exhibit 2052 which is a letter by, excuse  
 19 me, article in the Farmer's Union News titled Rural  
 20 Electric Association Won't Oppose Amendment E. In the  
 21 second paragraph, first sentence, it says the SDREA,  
 22 which stands for the South Dakota Rural Electric  
 23 Association's legislative committee has voted to adopt a  
 24 position of neutrality on Amendment E. Were you aware  
 25 of their position on Amendment E?

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1 A. No. If I was, I have forgotten, but I would  
 2 say no.  
 3 Q. Do you have any knowledge as to how or why  
 4 they adopted a position of neutrality on Amendment E?  
 5 A. No, I would have to think of all the  
 6 political ramifications before I come up with  
 7 conclusions on that. I don't have a conclusion at this  
 8 point.  
 9 MS. BRANNON: Thank you, that's all I  
 10 have.  
 11 EXAMINATION BY MR. GERDES:  
 12 Q. One question hopefully. You had some  
 13 discussions about the value of the Big Stone partnership  
 14 interest. Hypothetically, given the fact that Amendment  
 15 E has now been adopted, and let's say Western Public  
 16 Service Company wanted to sell its share in the Big  
 17 Stone plant, would you expect that a willing buyer would  
 18 pay more or less for that share now than before  
 19 Amendment E having been adopted.  
 20 A. All other things being equal as you say, then  
 21 I would say less, obviously.  
 22 EXAMINATION BY MS. BRANNON:  
 23 Q. I how much less in percentage terms?  
 24 A. With regard to the land? It would be a

Pag

1 Q. And why?  
 2 A. Because obviously if we were selling part of  
 3 our power plant, the buyer would be a power plant  
 4 operator, therefore the land itself, and I know your  
 5 position is it is insignificant to the plant, it is  
 6 significant to itself, the land would depreciate in  
 7 value significantly, because there is no value for the  
 8 matter of fact, as I understand the test of five years  
 9 or take no, or change the form of its use.  
 10 Q. So are you saying that the value of the Big  
 11 Stone plant to Northwestern would decrease by 40 to  
 12 percent?  
 13 A. The land, the land. Obviously the plant not.  
 14 Q. Just the land in question would decrease  
 15 because of that loss of rental income in the amount of  
 16 approximately \$3,500 a year?  
 17 A. Yes, most certainly.  
 18 EXAMINATION BY MS. BEST:  
 19 Q. First of all, I referred throughout your  
 20 deposition to Northwestern Public Service Company  
 21 the parent company as Northwestern. Now I was tal  
 22 about electric utility operations. You didn't  
 23 understand that I was talking about Northwestern Energy  
 24 natural gas marketing, did you?  
 25 A. Northwestern Public Service Company was th

Pag

1 original company commonly referred to as Northwestern,  
 2 assumed you were talking utility. The other one was  
 3 very specific.  
 4 Q. Then one other question is are you aware of  
 5 anything that would prohibit Otter Tail and Big Ston  
 6 partners from selling off those 552 acres over to the  
 7 Big Stone Cheese plant, or to a new ethanol facility,  
 8 something like that, commercial business?  
 9 A. Am I aware of anything that would prohibit  
 10 it? No. The only thing I would say is if we own it,  
 11 assume we own it for a reason. If that reason ceased  
 12 exist, I know of no reason we couldn't do it, but I  
 13 would like to be on the buyer side of the negotiations.  
 14 Q. Meaning if you have to divest, it would be  
 15 essentially a fire sale and you would like to be the  
 16 buyer, is that where you are going with that?  
 17 A. I am saying that it obviously has an  
 18 impairment, so you would rather be a buyer than a s  
 19 in such a transaction.  
 20 Q. Well, there is nothing to keep you from  
 21 selling it to a family farmer, is there?  
 22 A. I again would like to be the buyer, not the  
 23 seller.  
 24 MS. BEST: I have nothing further.



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<p>Page 1</p> <p>1 UNITED STATES DISTRICT COURT</p> <p>2 DISTRICT OF SOUTH DAKOTA</p> <p>3 CENTRAL DIVISION</p> <p>4 * * * * *</p> <p>5 SOUTH DAKOTA FARM BUREAU, INC.;</p> <p>6 SOUTH DAKOTA SHEEP GROWERS</p> <p>7 ASSOCIATION, INC.; HAVERHALS</p> <p>8 FEEDLOT, INC.; SJOVALL FEEDYARD,</p> <p>9 INC.; FRANK D. BROST; DONALD</p> <p>10 TESCH; WILLIAM A. AESCHLIMANN;</p> <p>11 SPEAR H. RANCH, INC.; MARSTON</p> <p>12 HOLBEN; MARSTON AND MARIAN</p> <p>13 HOLBEN FAMILY TRUST;</p> <p>14 MONTANA-DAKOTA UTILITIES CO.;</p> <p>15 NORTHWESTERN PUBLIC SERVICE;</p> <p>16 and OTTER TAIL POWER COMPANY,</p> <p>17</p> <p>18 Plaintiffs,</p> <p>19 -vs- CIV. NO. 99-3018</p> <p>20 JOYCE HAZELTINE, in her official capacity,</p> <p>21 as Secretary of State of South Dakota, and</p> <p>22 MARK W. BARNETT, in his official capacity</p> <p>23 as Attorney General of South Dakota,</p> <p>24</p> <p>25 Defendants.</p> <p>And</p> <p>DAKOTA RURAL ACTION and SOUTH</p> <p>DAKOTA RESOURCES COALITION,</p> <p>Defendant-Intervenors.</p> <p>* * * * *</p> <p>DEPOSITION OF</p> <p>MARK ROLFES</p> <p>* * * * *</p>	<p>Page 1</p> <p>1 INDEX TO EXAMINATIONS</p> <p>2 EXAMINATION BY MS. BEST ..... 4</p> <p>3 EXAMINATION BY MS. BRANNON ..... 21</p> <p>4 EXAMINATION BY MS. BEST ..... 32</p> <p>5 EXAMINATION BY MR. GERDES ..... 34</p> <p>6 EXAMINATION BY MR. GERDES ..... 36</p> <p>7 EXAMINATION BY MS. BEST ..... 37</p> <p>8 EXAMINATION BY MR. GERDES ..... 37</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15 INDEX TO EXHIBITS</p> <p>16</p> <p>17 30 Map of Big Stone Power Plant ..... 10</p> <p>18 2050 Mr. MacFarlane's Letter to</p> <p>19 Pastor Krahling 3/21/00 ..... 24</p> <p>20 2051 Big Stone Plant Ownership</p> <p>21 Agreement ..... 25</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p>Page 2</p> <p>1 APPEARANCES:</p> <p>2 Woods, Fuller, Shultz &amp; Smith</p> <p>3 Attorneys at Law</p> <p>4 300 South Phillips Avenue</p> <p>5 Sioux Falls, South Dakota 57104</p> <p>6 By Mr. John Simko</p> <p>7</p> <p>8 for South Dakota Farm Bureau, Inc., South Dakota</p> <p>9 Sheep Growers Association, Haverhals Feedlot, Inc.</p> <p>10 Sjovall Feedyard, Inc., Frank D. Brost, Donald</p> <p>11 Tesch, William A. Aeschlimann;</p> <p>12</p> <p>13 Tonner, Tobin &amp; King</p> <p>14 Attorneys at Law</p> <p>15 P. O. Box 1456</p> <p>16 Aberdeen, South Dakota 57402</p> <p>17 By Mr. Thomas Tobin</p> <p>18</p> <p>19 for Spear H. Ranch, Inc.; Marston Holben; Marston</p> <p>20 and Marian Holben Family Trust;</p> <p>21</p> <p>22 May, Adam, Gerdes &amp; Thompson</p> <p>23 Attorneys at Law</p> <p>24 P. O. Box 160</p> <p>25 Pierre, South Dakota 57501</p> <p>By Mr. David A. Gerdes</p> <p>for Montana-Dakota Utilities Co., Northwestern</p> <p>Public Service, Otter Tail Power Company;</p> <p>South Dakota Attorney General</p> <p>Attorneys at Law</p> <p>500 East Capitol</p> <p>Pierre, South Dakota 57501</p> <p>By Ms. Diane Best &amp; Ms. Roxanne Giedd</p> <p>for Joyce Hazeltine &amp; Mark W. Barnett;</p> <p>Earthlaw</p> <p>Attorneys at Law</p> <p>University of Denver - Forbes House</p> <p>1714 Poplar Street</p> <p>Denver, Colorado 80220</p> <p>By Ms. Virginia Brannon</p> <p>for Dakota Rural Action and South Dakota</p> <p>Resources Coalition.</p>	<p>Page 2</p> <p>1 STIPULATION</p> <p>2 It is stipulated and agreed by and</p> <p>3 between the above-named parties, through their attorn</p> <p>4 of record, whose appearances have been hereinabove</p> <p>5 noted, that the deposition of Mark Rolfes, may be tal</p> <p>6 at this time and place, that is, at the offices of May,</p> <p>7 Adam, Gerdes &amp; Thompson, Pierre, South Dakota, on the</p> <p>8 16th day of May, 2000, commencing at the hour of 11:30</p> <p>9 a.m.; said deposition taken before JERRY MAY, a</p> <p>10 Registered Professional Reporter and Notary Public</p> <p>11 within and for the State of South Dakota; said</p> <p>12 deposition taken for the purpose of discovery or for i</p> <p>13 at trial or for each of said purposes, and said</p> <p>14 deposition is taken in accordance with the applicable</p> <p>15 Rules of Civil Procedure as if taken pursuant to writ</p> <p>16 notice.</p> <p>17</p> <p>18 MARK ROLFES,</p> <p>19 called as a witness, being first duly sworn, deposed a</p> <p>20 said as follows:</p> <p>21</p> <p>22 EXAMINATION BY MS. BEST:</p> <p>23 Q. Mark, my name is Diane Best, I am an</p> <p>24 Assistant Attorney General, and I am representing th</p> <p>25 two Constitutional Officers that are named as defendants</p>

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1 Q. At some point in time in that ten year  
2 process you break ground and take the land out of ag  
3 production, or a significant portion of it, isn't that  
4 correct?  
5 A. If things would go in the normal sequence or  
6 an expected sequence, yes.  
7 Q. And it takes three to five years to build a  
8 plant?  
9 A. Correct.  
10 Q. So if you lease the ground for ag production  
11 for five years, and you don't start building until the  
12 sixth or seventh year, it is a year or two that the  
13 ground would have to sit idle waiting for you to start  
14 turning ground on building the plant, is that basically  
15 what your position is?  
16 A. If you follow the sequence, and you are able  
17 to, not to get delays that extend it, yes.  
18 Q. And if you don't get your regulatory  
19 authority, then you don't continue to own the land,  
20 correct?  
21 A. That would be my assumption that you would  
22 dispose of the land if you knew you weren't going to  
23 build.  
24 MS. BEST: That's all.  
25 MR. GERDES: Let me ask just a few

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1 questions for clarification.  
2 EXAMINATION BY MR. GERDES:  
3 Q. Mr. Rolfes, you indicated that the preference  
4 of the Big Stone partners would be to keep the property,  
5 there was a series of questions by Mrs. Best dealing  
6 with you could sell the property, that kind of thing.  
7 What do you mean by the first preference would have been  
8 to keep the property, would be to keep the property,  
9 excuse me?  
10 A. If at all possible, we would keep the  
11 property.  
12 Q. And then why? I think you have probably  
13 already answered that, but I want you to tell me why you  
14 want to keep the property, why that's your preference?  
15 A. Because of a number of complications, one  
16 being future expansion which we have touched upon. The  
17 other is still maintaining the buffer zone for noise,  
18 dust, any other permitting, it is much simpler to have  
19 the land under our control than to have it sold with the  
20 possibility of residences being built there, or we would  
21 lose control of what could be done with the land.  
22 Q. Another question. You talked about the  
23 possibility that if there were an expansion of the plant  
24 there would need to be new transmission. Are the  
25 current transmission corridors sufficient or would

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1 there have to be new transmission corridors to go al  
2 with the new transmission facility?  
3 A. To the best of my knowledge on the existing  
4 property that the plant owns there is sufficient, but  
5 once it leaves the boundary new corridors would hav  
6 be purchased.  
7 Q. So what you are saying is there would have to  
8 be new transmission corridors as that new energy le  
9 the property and it would have to somehow intersect with  
10 existing transmission facilities somewhere, correct?  
11 A. All the studies we have done, new  
12 transmission lines would have to be built.  
13 Q. You talked about if there was a plant  
14 expansion, either with reference to the NSP request fo  
15 proposal or for other reasons, this would involve  
16 different ownership. Are you talking about a  
17 reconfiguration of the existing ownership, or are you  
18 talking about a side by side ownership situation? Do  
19 you understand my question?  
20 A. You have to realize it is speculation on my  
21 part, but the speculation is that the new facility woul  
22 have different ownership than the existing facility.  
23 Q. So it would stand side by side to the  
24 existing ownership configuration, is that correct?  
25 A. That's correct.

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1 Q. Would there be a necessity to acquire more  
2 land to put this expansion on?  
3 A. The odds are very good that it would need  
4 additional land purchased.  
5 MR. GERDES: That's all I have. Under  
6 the rules you can read and sign the deposition or trus  
7 in the accuracy of the Court Reporter and you can w  
8 the reading and signing. I would recommend that yo  
9 waive it, so you have to say on the record that you  
10 waive the reading and signing.  
11 THE WITNESS: I agree to waive the  
12 reading.  
13 MR. GERDES: I would like to put  
14 Mr. Rolfes back on the stand for one question I forg  
15 to ask, specially since I feel you might want to cross  
16 examine on it.  
17 EXAMINATION BY MR. GERDES:  
18 Q. Mr. Rolfes, has the ownership configuration  
19 of the Big Stone plant changed since it was first put  
20 into production?  
21 A. Yes, it has.  
22 Q. And that happened when?  
23 A. I believe it was 1986.  
24 Q. Would you tell us how that occurred, please?  
25 A. It is the same three owners but the

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**5/16/**

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1 ownership percentage changed, Northwestern Public  
 2 Service sold roughly 10 percent of the plant with  
 3 roughly half going to Otter Tail and half going to MDU.

4 MR. GERDES: That's all I have.

5 EXAMINATION BY MS. BEST:

6 Q. Did the change in structure require  
 7 regulatory approval?

8 A. Oh, yes.

9 Q. State PUC approval?

10 A. I believe it was State PUC.

11 Q. Did that also require Federal Energy  
 12 Regulatory Commission approval?

13 A. I believe it did not.

14 Q. Nothing further.

15 EXAMINATION BY MR. GERDES:

16 Q. Why did NWPS sell that share, if you know?

17 A. To the best of my knowledge they felt they  
 18 had more facilities than they needed, and Otter Tail and  
 19 MDU were looking for additional facilities, additional  
 20 resources, so it seemed to work very well.

21 MR. GERDES: Thank you very much.

22

23

24

25

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1 STATE OF SOUTH DAKOTA )

2 :SS CERTIFICATE

3 COUNTY OF MINNEHAHA )

4

5

6 I, JERRY MAY, Court Reporter and Notary

7 Public within and for the State of South Dakota:

8 DO HEREBY CERTIFY that the witness was

9 first duly sworn by me to testify to the truth, the  
 10 whole truth, and nothing but the truth relative to the  
 11 matter under consideration and that the forgoing pages  
 12 1-37, inclusive are a true and correct transcript of my  
 13 stenotype notes made during the time of the taking of  
 14 the deposition of this witness.

15 I FURTHER CERTIFY that I am not an  
 16 attorney for, nor related to the parties to this action,  
 17 and that I am in no way interested in the outcome of  
 18 this action.

19 In testimony whereof, I have hereto set  
 20 my hand and official seal this 20th day of May, 2000.

21

22

23

24

25

\_\_\_\_\_  
 NOTARY PUBLIC



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Page 1

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF SOUTH DAKOTA

3 \* \* \* \* \* CENTRAL DIVISION \* \* \* \* \*

4 SOUTH DAKOTA FARM BUREAU, INC.;

5 SOUTH DAKOTA SHEEP GROWERS

6 ASSOCIATION, INC.; HAVERHALS

7 FEEDLOT, INC.; SJOVALL FEEDYARD,

8 INC.; FRANK D. BROST; DONALD

9 TESCH; WILLIAM A. AESCHLIMANN;

10 SPEAR H. RANCH, INC.; MARSTON

11 HOLBEN; MARSON AND MARIAN

12 HOLBEN FAMILY TRUST;

13 MONTANA-DAKOTA UTILITIES CO.;

14 NORTHWESTERN PUBLIC SERVICE;

15 and OTTER TAIL POWER COMPANY,

16

17 Plaintiffs,

18 -vs- CIV. NO. 99-3018

19 JOYCE HAZELTINE, in her official capacity,

20 as Secretary of State of South Dakota, and

21 MARK W. BARNETT, in his official capacity

22 as Attorney General of South Dakota,

23 Defendants.

24 And

25 DAKOTA RURAL ACTION and SOUTH

DAKOTA RESOURCES COALITION,

Defendant-Intervenors.

\* \* \* \* \*

DEPOSITION OF

ROBERT KRAVA

\* \* \* \* \*

Page 2

1 APPEARANCES:

2 Woods, Fuller, Shultz & Smith

3 Attorneys at Law

4 300 South Phillips Avenue

5 Sioux Falls, South Dakota 57104

6 By Mr. John Simko

7 for South Dakota Farm Bureau, Inc., South Dakota

8 Sheep Growers Association, Haverhals Feedlot, Inc.

9 Sjovalld Feedyard, Inc., Frank D. Brost, Donald

10 Tesch, William A. Aeschlimann;

11 Tonner, Tobin & King

12 Attorneys at Law

13 P. O. Box 1456

14 Aberdeen, South Dakota 57402

15 By Mr. Thomas Tobin

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17 and Marian Holben Family Trust;

18 May, Adam, Gerdes & Thompson

19 Attorneys at Law

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24 Public Service, Otter Tail Power Company;

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for Dakota Rural Action and South Dakota

Resources Coalition.

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24

25

Page

1 STIPULATION

2 It is stipulated and agreed by and

3 between the above-named parties, through their attorne

4 of record, whose appearances have been hereinabove

5 noted, that the deposition of Robert Krava, may be tak

6 at this time and place, that is, at the offices of May,

7 Adam, Gerdes & Thompson, Pierre, South Dakota, on the

8 16th day of May, 2000, commencing at the hour of 2:

9 p.m.; said deposition taken before JERRY MAY, a

10 Registered Professional Reporter and Notary Public

11 within and for the State of South Dakota; said

12 deposition taken for the purpose of discovery or for us

13 at trial or for each of said purposes, and said

14 deposition is taken in accordance with the applicable

15 Rules of Civil Procedure as if taken pursuant to writte

16 notice.

17

18 ROBERT KRAVA,

19 called as a witness, being first duly sworn, deposed an

20 said as follows:

21

22 EXAMINATION BY MS. BEST:

23 Q. For the record, this deposition is being

24 taken on May 16 at the offices of May, Adam, Gerdes

25 Thompson in Pierre, South Dakota. The parties have

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<p>1 need to be done for transmission lines for planned 2 projects?</p> <p>3 A. Not that I am aware of.</p> <p>4 Q. In other words, you don't have any sitting on 5 your desk?</p> <p>6 A. No, I don't have any sitting on my desk.</p> <p>7 Q. Have you been, your company takes the 8 position that it will cost money to comply with 9 Amendment E with respect to transmission lines or 10 easements for transmission lines. Have you been 11 involved in any calculations of how much complying with 12 Amendment E will cost for procuring easements?</p> <p>13 A. No formal studies, no.</p> <p>14 Q. What about informal, please discuss that 15 issue?</p> <p>16 A. I have thought about it since this has come 17 to light, and in my opinion it would cost two to 18 probably three hundred percent more to acquire easements 19 for transmission lines.</p> <p>20 Q. Have you yet been in the position where 21 acquisition of easements has doubled and tripled due to 22 Amendment E?</p> <p>23 A. No, we haven't purchased any to my knowledge 24 since Amendment E has come in to light.</p> <p>25 Q. Wouldn't you be the person that would be</p>	<p>1 A. Yes.</p> <p>2 Q. And in relation to leasing land to farmers 3 around at the Big Stone plant, is that the only cost 4 associated with, in other words, is that loss of income 5 the only cost that comes to your mind, or are there 6 other problems as well?</p> <p>7 A. Well, there has been a discussion that that 8 land may have to be sold if it is not farmed. I mean I 9 have heard that in discussions.</p> <p>10 Q. Why is that, why would it have to be sold if 11 it is not farmed?</p> <p>12 A. I am not sure.</p> <p>13 Q. One of the allegations in the complaint, and 14 I am trying to understand the factual basis for that, is 15 that sale of the plant would require successor owners 16 divest themselves of those lands now held for future 17 development. I don't understand the factual basis for 18 that, and I was wondering if you could help me out?</p> <p>19 A. No, I can't.</p> <p>20 Q. So based on your understanding, you could 21 hold onto the land as long as you are willing to forgo 22 that rental income, is that correct?</p> <p>23 A. I have heard discussions that that is one 24 interpretation, another that it would have to be sold.</p> <p>25 Q. But you are not sure why it would have to be</p>
Page 14	Page
<p>1 aware of it if the cost of an easement doubled or 2 tripled?</p> <p>3 A. Yes.</p> <p>4 Q. So it's pretty safe to say that there haven't 5 been any yet, isn't that correct?</p> <p>6 A. That's correct.</p> <p>7 MS. BEST: I am going to stop here, I 8 know Ginny has some questions.</p> <p>9 EXAMINATION BY MS. BRANNON:</p> <p>10 Q. Mr. Krava, I am Ginny Brannon, attorney for 11 Dakota Rural Action and South Dakota Resources 12 Coalition.</p> <p>13 A. Okay.</p> <p>14 Q. I have some follow-up questions. Not too 15 many, but I indulge your patience if I covered something 16 the State already covered because sometimes I need some 17 clarification?</p> <p>18 A. Okay, that's fine.</p> <p>19 Q. I would like to talk first about farming 20 around the Big Stone plant.</p> <p>21 A. Okay.</p> <p>22 Q. What is the -- my understanding is that 23 potentially there is a worry that you might lose out on 24 rental income from leasing land to farmers around the 25 Big Stone plant, is that correct?</p>	<p>1 sold, is that correct?</p> <p>2 A. That's correct.</p> <p>3 Q. Let's move on to the transmission facilities 4 and the easement issue, which is sort of the other, 5 seems to me, based on the complaint, big issue problem 6 utilities are having with Amendment E.</p> <p>7 A. Okay.</p> <p>8 Q. My understanding is that the utility 9 companies are concerned, Otter Tail specifically is 10 concerned that Amendment E might increase the cost of 11 purchasing easements, is that correct?</p> <p>12 A. Yes.</p> <p>13 Q. And also that it might increase the cost of 14 constructing and maintaining transmission facilities, is 15 that correct?</p> <p>16 A. Yes.</p> <p>17 Q. Could you explain to me how it will increase 18 the cost of constructing and maintaining transmission 19 facilities?</p> <p>20 A. Well, if it can't be farmed, there would be 21 the maintenance or weed control, we would face that even 22 on existing farmed right-of-way, because we do have to 23 treat or chemically treat just the area around the pole 24 that is not being farmed. This way if we can't farm the 25 100, 120 feet, 200 feet, depending on what the</p>

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1 right-of-way width is for that specific line voltage or  
2 line size, or line construction method, the maintenance  
3 of that many acres is certainly going to be an  
4 additional cost. As far as construction, typically you  
5 can't construct a transmission line on the right-of-way  
6 strip, so we would have to buy additional property to do  
7 the construction from. Whereas in an easement  
8 situation, we have the easement strip, and we also have  
9 the right to enter on the rest of the encumbered  
10 property for construction purposes, maintenance  
11 purposes.  
12 Q. I am not following that, Mr. Krava. Could  
13 you explain, I don't understand.  
14 A. Okay, which part?  
15 Q. Let's take an example.  
16 A. Okay.  
17 Q. Let's say that you have got this say 100 foot  
18 width transmission corridor, and you can't farm on it.  
19 A. Right.  
20 Q. Okay, what, how, first of all, how just  
21 practically are you going to work that? Are you just  
22 going to do weed control along that area, is that the  
23 only thing you would need to do, and then the farmer  
24 could go back and forth across the land, or how would it  
25 work?

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1 A. I am speculating here because we don't have  
2 any instances that are actually in that situation. It  
3 depends on what we are required to do. There is talk  
4 that it may have to be fenced, okay. That is an  
5 additional maintenance cost with the fencing, it also  
6 makes that land much more difficult to acquire if you  
7 are basically separating the farmed say 160 acres and  
8 now separating in to two pieces so that they can't cross  
9 that strip.  
10 Q. Okay.  
11 A. The acquisition will be in my opinion  
12 impossible except through an eminent domain or  
13 condemnation situation, based on experience.  
14 Q. Is there any other way, you were talking  
15 before about having to buy additional land around, I  
16 wasn't following that. What were you talking about?  
17 A. I was talking about if we have to buy the  
18 strip, the right-of-way strip, whatever width it may be,  
19 in fee so that we actually own it, not an easement  
20 situation, typically we can't construct in what we buy  
21 as an easement strip. In the easement document there is  
22 a piece of land that is encumbered which may be 80 acres  
23 or 160 acres, whatever that landowner has title to, then  
24 there is also the legal description of this 100 or  
25 whatever width strip that we have the right to place our

Page

1 facilities on. We have the right to basically go any  
2 place on the farm to get to this construction site.  
3 Whereas if we had to buy it, we would be in trespass  
4 unless we bought a lease for construction, or we are  
5 granted some other method of getting there.  
6 Q. So you could buy an easement, for example, a  
7 right-of-way easement just to get to the spot, get to  
8 the transmission corridor?  
9 A. My understanding is we would have to buy an  
10 additional easement for ingress-egress at least, and for  
11 construction.  
12 Q. Mr. Krava, can you explain to me why you  
13 would necessarily have to buy the transmission corrid  
14 in fee as opposed to simply paying a higher price for  
15 the easement based on the farmer's now inability to farm  
16 on that land?  
17 A. I believe that is the only way we could  
18 acquire it. I don't think they will give us an easemen  
19 through that property, even paying more, if they are n  
20 able to farm it.  
21 Q. Has your company engaged in any discussions  
22 with farmers on this issue?  
23 A. No, we haven't.  
24 Q. So you are just speculating then?  
25 MR. GERDES: I will object to that as

Page

1 argumentative. Go ahead and answer if you can. Are you  
2 speculating?  
3 A. Based on my experience, no, I am not  
4 speculating, that's the way I would see it playing out.  
5 Q. Mr. Krava, I think you told the State that  
6 your estimation was that the cost of acquiring an  
7 easement would be two to three hundred percent more than  
8 it currently is?  
9 A. Um-hum.  
10 Q. What is it currently?  
11 A. Our current payments for easements are based  
12 on the land value for the easement strip, and then a  
13 structure payment which is reviewed basically annual  
14 So it's a combination of paying for the land encumbered,  
15 and then for each structure, or any part of the facility  
16 that is placed on that property.  
17 Q. How much do you typically pay, do you have a  
18 dollar estimate based on all of those factors?  
19 A. No, I don't, I would have to have a specific  
20 situation where we would know the land value, then I  
21 can, then I could give you that estimate of what it  
22 would cost.  
23 Q. I would like to introduce a document as an  
24 Exhibit. This is an example of a right-of-way easeme  
25 drafted by Otter Tail Power Company. It is not filled

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1 in, but it is an example of one drafted by Otter Tail  
2 Power Company. Take a look at that.  
3  
4 (Krava Deposition Exhibit 2053 marked For  
5 identification.)  
6  
7 Q. This example of a right-of-way easement  
8 contemplates consideration of the sum of \$1.00 to give  
9 Otter Tail Power Company an easement for a period of 99  
10 years.  
11 A. Okay, we have many different forms. Okay,  
12 yes.  
13 Q. Is that correct?  
14 A. That's correct.  
15 Q. So is this a typical example of a  
16 right-of-way easement?  
17 A. Yes, it is.  
18 Q. And what does this \$1.00 mean then?  
19 A. That is basically just a terminology on the  
20 easement form. There is another form that goes with it  
21 that is not recorded which is called a easement payment  
22 agreement.  
23 Q. Does this mean that Otter Tail pays the  
24 farmer \$1.00 for an easement on their property for a  
25 period of 99 years?

Page 22

1 A. No.  
2 Q. What does it mean?  
3 A. The language that is used in most common  
4 easements.  
5 Q. I am sorry, I don't understand, Mr. Krava,  
6 what is the \$1.00 for?  
7 A. There has to be some, there has to be a money  
8 exchange for title to property, or partial title as an  
9 easement is, and it doesn't specify that you have to  
10 identify the full amount, but that there is a monetary  
11 exchange for the easement.  
12 Q. Yes, there needs to be consideration we call  
13 it, correct?  
14 A. Right.  
15 Q. And the consideration in this contract is  
16 \$1.00, is that correct?  
17 A. \$1.00 and other good and valuable  
18 consideration, yes.  
19 Q. Okay, what would constitute that other good  
20 and valuable consideration?  
21 A. More money, could be conditions other than  
22 money such as cutting trees and leaving them for the  
23 landowner, could be consideration of building an access  
24 road. There is many, many different other  
25 considerations.

Page 2

1 Q. Mr. Krava, do you have -- not with you, of  
2 course, but do you have examples of such contracts th  
3 would show other considerations for the easement beyond  
4 just this?  
5 A. Do we have other easement forms?  
6 Q. Yes, maybe even signed documents that are  
7 filled out?  
8 A. Oh, sure, we have in excess of 65,000  
9 easement forms that are public record, recorded in eve  
10 courthouse that we operate in.  
11 Q. Mr. Krava, how did you arrive at the  
12 estimation that the increased costs to acquire an  
13 easement would be two to three hundred times, percen  
14 more than what it is now?  
15 A. Talking with some of the people in our  
16 department, we tried to arrive at some amount, but unt  
17 we actually go to court and have to pay for one I don't  
18 think that anyone knows that. It is just basically the  
19 people in my department and myself discussing this issue  
20 and how it would affect, our feelings as experienced  
21 acquirers of easements and real estate how it would  
22 affect it.  
23 Q. Is there anything in writing, any documents,  
24 any studies, any data, any market analysis, anything?  
25 A. No, there is not.

Page 2

1 Q. Just based on conversations then, is that  
2 correct?  
3 A. That's right.  
4 Q. In the event of deregulation, what would be  
5 the harm to Otter Tail if deregulation or restructuring  
6 occurred, obviously in connection with Amendment E?  
7 A. In my opinion the restructuring or  
8 transferring easement documents or real estate fee title  
9 to a new corporation would therefore make the easements  
10 invalid, so you lose the asset of however many thousar  
11 easements we would have in South Dakota.  
12 Q. So then what would you do?  
13 A. My understanding is we would have to buy,  
14 re-buy those existing facilities, locations, not  
15 necessarily the poles and wires, but the real estate  
16 that it sits on, or the new corporation would have to.  
17 I am not saying we, Otter Tail Power Company, but th  
18 new corporation, the new owner who had those easements  
19 assigned.  
20 Q. And that is the factual basis for one of the  
21 allegations that is made in the complaint. There is  
22 another allegation that is made in the complaint in  
23 regard to deregulation, and I would like to see if you  
24 can help me with the factual basis for it. It says  
25 there will be less money from the sale or spin off of



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1 Register of Deeds?

2 A. Yes, I do.

3 Q. Do you know what an easement consists of

4 versus a lease, versus some other land property

5 interest, correct?

6 A. I don't know the legal interpretations of

7 what is a lease. I feel I have a good understanding of

8 the easement process, yes.

9 Q. Is an easement an interest in title?

10 MR. GERDES: I object to that as calling

11 for a legal conclusion and without proper foundation.

12 If you know, you can answer it.

13 A. Yes.

14 Q. Is an easement a legal interest in real

15 estate?

16 MR. GERDES: Same objection.

17 A. Yes, it is.

18 Q. Is there, I mean you have been in the

19 easement business for a long time, is there a difference

20 in your mind between an easement interest in title and

21 an easement interest in real estate?

22 MR. GERDES: Same objection. Calls for a

23 legal conclusion without proper foundation.

24 A. Can you restate that? Is there a difference?

25 Q. We talked about an easement, were we talking

Page 30

1 about an easement being an interest in title, or an

2 easement being an interest in land, or is it the same

3 thing?

4 MR. GERDES: Same objection, no proper

5 foundation.

6 A. My understanding of your question is an

7 easement gives you partial interest to that real estate.

8 Q. I want to ask you about this, who would be in

9 a position to determine whether land has to be fenced

10 along the electric utility corridor, or excuse me, the

11 electricity transmission line corridor?

12 A. Who would determine if it had to be fenced?

13 Q. Yes.

14 A. I have no idea.

15 Q. That is not something you think you would be

16 negotiating with the individual farmer?

17 A. No. I think that that is something that

18 would have to be arrived at through the interpretation

19 of the law or Amendment E.

20 Q. And apparently that determination has not yet

21 been made in terms of Otter Tail Power Company's

22 operations?

23 A. Not to my knowledge.

24 Q. Then finally questions came up about the

25 power plant. Are there appraisals of the Big Stone

Page

1 power plant?

2 A. I am not aware of any appraisals. It was

3 acquired before I was employed by Otter Tail Power

4 Company.

5 Q. Do you have anything in the land office that

6 would indicate what Otter Tail sees as the worth of th

7 plant, the value of the plant and real estate?

8 A. Not in the land management office, no.

9 Q. So you don't have an inventory of utility

10 property with a value associated with it for the land

11 management office?

12 A. No, we don't.

13 Q. That would be something more the depreciation

14 people would have?

15 A. My understanding that would be the property

16 accounting area.

17 Q. One question comes up, Otter Tail takes the

18 position now that its acquisition of easements, yeah,

19 acquisition of easements for land use for farming wou

20 violate Amendment E. Does it take a similar position

21 with regard to the Family Farm Act that was previous

22 in effect?

23 MR. GERDES: I object to that question as

24 misstating Otter Tail's position. Go ahead and answe

25 it if you can.

Page

1 MR. SIMKO: I also object because the

2 Family Farm Act of 1974 is dramatically different th

3 Amendment E, so the question is misleading.

4 A. I am not aware of the Family Farm Act of

5 1974, or whatever date, so I can't make a comparison.

6 Q. So the first time you ever heard anything

7 about any easements, problems with corporate farmin

8 laws being a restriction on obtaining easements has to

9 do with this Amendment E, that's the first time that

10 came up with Otter Tail?

11 A. Yes.

12 MS. BEST: I have nothing further.

13 EXAMINATION BY MR. GERDES:

14 Q. Mr. Krava, Mrs. Best just got done going

15 through your qualifications in that you have negotiate

16 a large number of easements over the years, is that

17 correct?

18 A. That's correct.

19 Q. And over those years have you developed an

20 understanding as to the cost of those easements to Ott

21 Tail when they are negotiated?

22 A. Yes.

23 Q. And have you developed an understanding of

24 the factors that go in to determining that cost?

25 A. Yes.

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<p>1 Q. And so you believe that you right now as you</p> <p>2 sit there can take a look at a piece of property knowing</p> <p>3 the per acre value of that property and determine about</p> <p>4 what it should cost to buy a transmission easement?</p> <p>5 A. Once a survey has been conducted, yes.</p> <p>6 Q. Let's just say we are talking about a piece</p> <p>7 of land that is worth \$900 an acre, how much is it going</p> <p>8 to cost you before Amendment E to acquire a transmission</p> <p>9 line easement across that property?</p> <p>10 A. \$900 an acre, and I would have to know the,</p> <p>11 how much of the quarter, 80, 40, that we are crossing.</p> <p>12 Q. Let's say you are going across a section of</p> <p>13 land, 640 acres?</p> <p>14 A. So 900 times about fourteen and a half acres,</p> <p>15 and then that would be the land value of the easement.</p> <p>16 The structure value of the easement payment would be</p> <p>17 based on the number of structures placed on that. At</p> <p>18 the current time that is \$1,000 per two pole structure,</p> <p>19 and then various down guys or guy wires would be</p> <p>20 additional added in, and this is where the survey would</p> <p>21 determine actually what facilities are placed on that</p> <p>22 piece of property. So \$900 an acre, I would look that</p> <p>23 we would be paying, with a two pole 230 volt, just as an</p> <p>24 example, I would look that we would be paying</p> <p>25 approximately \$20,000 if it is straight. If there is</p>	<p>1 they came up with the figures that they were talking</p> <p>2 about, is that correct?</p> <p>3 A. Certainly.</p> <p>4 MS. BRANNON: I have to object to this,</p> <p>5 Mr. Gerdes fed the deponent, Diane said, that did not</p> <p>6 come from the deponent's mouth.</p> <p>7 MR. GERDES: Are you objecting to my</p> <p>8 question as leading?</p> <p>9 MS. BRANNON: Yes, extremely.</p> <p>10 Q. So, when you say two to three hundred percent</p> <p>11 then, what are you basing that on in terms of why are</p> <p>12 you saying 200 percent rather than 100 percent, or 150</p> <p>13 percent, what is the thought process that you go</p> <p>14 through?</p> <p>15 A. The thought process is past jobs or past</p> <p>16 easements that we have had to condemn where we couldn't</p> <p>17 buy a voluntary easement, where we had to condemn a</p> <p>18 piece of property to acquire either the easement or fee.</p> <p>19 and these were basically the amounts that were, you</p> <p>20 know, we are talking about.</p> <p>21 Q. When you are talking about acquiring the fee,</p> <p>22 you are not talking about acquiring an easement in the</p> <p>23 fee, you are talking about acquiring fee title, are you</p> <p>24 not?</p> <p>25 A. Yes, I am. When I am speaking fee, I am</p>
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<p>1 angles in the line, it would be considerably more based</p> <p>2 on the number of angles and down guys associated with</p> <p>3 that angle.</p> <p>4 Q. How is that being paid, is it paid in one</p> <p>5 lump sum, or how is it paid typically, again before</p> <p>6 Amendment E?</p> <p>7 A. Typically it depends on the state.</p> <p>8 Q. South Dakota?</p> <p>9 A. South Dakota would be paid in a lump sum</p> <p>10 payment.</p> <p>11 Q. You have said that with Amendment E you</p> <p>12 believe it would cost two to three hundred percent more</p> <p>13 for that same transmission easement, correct?</p> <p>14 A. Yes, that's correct.</p> <p>15 Q. You were asked by Ms. Brannon whether or not</p> <p>16 that was based on conversations. Actually that opinion</p> <p>17 was based upon more than conversations, wasn't it?</p> <p>18 A. It was based on conversations with my, with</p> <p>19 people working.</p> <p>20 Q. Was it based on your experience?</p> <p>21 A. Based on my experience, overall the members</p> <p>22 taking part in the conversation, I guess that is.</p> <p>23 Q. And each of the members have had experience?</p> <p>24 A. Why yes.</p> <p>25 Q. And were able to think of for instances when</p>	<p>1 talking about buying the real estate property. Otter</p> <p>2 Tail Power or the subsidiary company that we are working</p> <p>3 for is owning that in fee title, whereas easements</p> <p>4 acquisition would be just a partial interest in that</p> <p>5 fee.</p> <p>6 Q. When we lawyers were in law school and when</p> <p>7 we talked about fee title, our property teacher talked</p> <p>8 about owning the entire bundle of sticks, have you hav</p> <p>9 ever heard that analogy?</p> <p>10 A. Many times.</p> <p>11 Q. And fee title is the whole bundle of sticks,</p> <p>12 correct?</p> <p>13 A. Fee title is the bundle of sticks remaining</p> <p>14 at the time of acquisition, yes.</p> <p>15 Q. And then easements and leases and whatever,</p> <p>16 they are something less than the whole bundle of stick</p> <p>17 would that be correct?</p> <p>18 A. Yes.</p> <p>19 Q. You were asked some questions by Ms. Best</p> <p>20 concerning what you do for permitting and things like</p> <p>21 that when you are acquiring land. Would it be true th</p> <p>22 this whole process is done in consultation with legal</p> <p>23 counsel?</p> <p>24 A. Yes.</p> <p>25 Q. You had a conversation with Ms. Brannon</p>

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1 about, or excuse me, Mrs. Best about fencing. Assuming  
2 that Amendment E were interpreted by the Court to say  
3 that farmers could not have access to that corridor, how  
4 would you keep them out, would you have to fence it?

5 A. A fence would be one method. I don't know  
6 what other methods, they would have to be explored if  
7 they can't cross that piece of property.

8 Q. That would be an expense of developing a  
9 power line easement that was affected by Amendment E,  
10 would it not?

11 A. Yes.

12 Q. Looking at Mr. MacFarlane's letter that you  
13 and Ms. Brannon were talking about, when he is talking  
14 about a five year development for a power plant, he is  
15 talking about the fact that it would take more than five  
16 years to develop a new facility with Amendment E being  
17 in place. Read that paragraph, isn't that what he is  
18 talking about?

19 A. I would, my opinion is that is what he is  
20 talking about. He did not confer with me when he wrote  
21 this.

22 Q. I just wanted to make sure that you and  
23 Ms. Brannon were connecting up here in what he is  
24 talking about. It is new power plants in general, not  
25 talking about adding onto the Big Stone plant, is he?

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1 A. I think when he states that it took longer  
2 than five years to develop Big Stone, he was using that  
3 as an example that, from what I have heard prior even to  
4 today, that it is ten to twelve years for siting a  
5 plant, and I think that is what he is referring to,  
6 although like I said, he wrote it.

7 Q. And it means what it says, right?

8 A. Yes, it does.

9 MR. GERDES: That's all I have, thank  
10 you.

11 MS. BEST: Nothing else.

12 EXAMINATION BY MS. BRANNON:

13 Q. One follow-up, Mr. Krava. I am wondering if  
14 you would be willing to produce at some future time an  
15 example of, some examples of the easements you were  
16 talking about? The only thing that we got was this form  
17 Exhibit 2053 which is not even filled in, and it has the  
18 consideration of \$1.00 and then what would be attached  
19 is the and other good and valuable considerations,  
20 that's of course what I would be interested in?

21 MR. GERDES: We will take a look at it  
22 and produce some.

23 EXAMINATION BY MR. SIMKO:

24 Q. Mr. Krava, you have seen thousands of  
25 easements such as Exhibit 2053 in completed form?

Page :

1 A. Right.

2 Q. Have you also seen many warranty deeds where  
3 title has actually been conveyed from a seller to a  
4 buyer in which the consideration is recited within that  
5 warranty deed?

6 A. Yes, we write many warranty deeds.

7 Q. Have you seen warranty deeds where the  
8 purchase price for the property is hundreds of thousand  
9 of dollars, and the title, the warranty deed says for  
10 \$1.00 and other good and valuable consideration?

11 A. Yes.

12 MR. SIMKO: That's all I have.

13 MR. GERDES: Do you waive the reading and  
14 signing of the deposition.

15 THE WITNESS: Yes, I do.

Page

1 STATE OF SOUTH DAKOTA )

2 :SS CERTIFICATE

3 COUNTY OF MINNEHAHA )

4  
5  
6 I, JERRY MAY, Court Reporter and Notary  
7 Public within and for the State of South Dakota:

8 DO HEREBY CERTIFY that the witness was  
9 first duly sworn by me to testify to the truth, the  
10 whole truth, and nothing but the truth relative to the  
11 matter under consideration and that the foregoing pages  
12 1-39, inclusive are a true and correct transcript of my  
13 stenotype notes made during the time of the taking of  
14 the deposition of this witness.

15 I FURTHER CERTIFY that I am not an  
16 attorney for, nor related to the parties to this action,  
17 and that I am in no way interested in the outcome of  
18 this action.

19 In testimony whereof, I have hereto set  
20 my hand and official seal this 21st day of May, 2000.

21  
22  
23  
24  
25  
NOTARY PUBLIC